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Just Electric, Inc., International Brotherhood of Electrical Workers Local 20. Case 16-CA-22137

January 28, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

The General Counsel seeks summary judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by the Union on August 23, 2002,¹ the General Counsel issued the complaint on October 16, against Just Electric, Inc., the Respondent, alleging that it has violated Section 8(a)(3) and (1) of the Act. The Respondent failed to file an answer.

On November 19, the General Counsel filed a Motion for Summary Judgment with the Board. On November 22, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated October 31, notified the Respondent that unless an answer was received by November 7, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment insofar as the complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider or hire three job applicants. Specifically, the complaint alleges that "[o]n about March 26, Earl White, Rusty Stricklan, and Lance Miller applied for employment with the Re-

spondent," and "[s]ince that date, Respondent has refused to consider or hire Earl White, Rusty Stricklan, and Lance Miller . . . because of [their] Union activities and sympathies and to discourage employees from engaging in these activities." We agree that these undisputed allegations are sufficient to establish violations of Section 8(a)(3) and (1) under the standards set forth in *FES*, 331 NLRB 9, 12-16 (2000), supp. decision 333 NLRB No. 8 (2001), enf'd. 301 F.3d 83 (3d Cir. 2002). See *Jet Electric Co.*, 334 NLRB No. 133 (2001), supp. decision 338 NLRB No. 77 (2002); see also *Budget Heating & Cooling*, 332 NLRB No. 132 (2000).

Under the *FES* standards, however, the complaint allegations are insufficient to enable us to determine the appropriate remedy. In this regard, the Board held in *FES* that in cases involving more than one applicant, the General Counsel, in order to justify an affirmative remedy of instatement and backpay, must show at the unfair labor practice stage of the proceeding the number of openings that were available. 331 NLRB at 14. See also *Jet Electric Co.*, supra.

The complaint alleges that the Respondent refused to consider or hire the discriminatees, but does not allege how many openings were available. Because the General Counsel bears the burden of proving that there were a sufficient number of openings at the initial unfair labor practice stage of the proceeding, the complaint's allegations do not establish that a backpay and instatement remedy is warranted. *Jet Electric Co.*, supra. We shall therefore hold in abeyance a final determination of the appropriate remedy,² pending a remand of this case for a hearing before an administrative law judge on the limited issue of the number of openings that were available to the discriminatees.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Texas corporation has been engaged in the business of electrical construction.

² Whether, or the extent to which, an affirmative remedy for the refusal-to-consider violations is warranted will depend on whether the evidence shows that enough openings were available to justify the more comprehensive remedy of instatement and backpay for the refusal to hire violations. *Jet Electric Co.*, supra, slip op. at fn. 2; *Budget Heating & Cooling*, supra, slip op. at fn. 3.

³ A hearing will not be required if, after the General Counsel amends the complaint, the Respondent fails to answer, thereby admitting evidence that would permit the Board to resolve the remedial instatement and backpay issue. In such circumstances, the General Counsel may renew the motion for summary judgment with respect to this specific affirmative remedy. See *Jet Electric Co.*, supra, slip op. at fn.2.

¹ All dates herein refer to 2002 unless otherwise noted.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, purchased and received at its Dallas, Texas facility goods and materials valued in excess of \$50,000 from other enterprises, including Consolidated Electrical Distributors, located within the State of Texas, which has received these goods and materials directly from points outside the State of Texas.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times Pat Dillehay has held the position of President and has been a supervisor within the meaning of Section 2(11) of the Act and an agent within the meaning of Section 2(13) of the Act.

On about March 26, Earl White, Rusty Stricklan, and Lance Miller applied for employment with the Respondent.

Since that date, the Respondent has refused to consider or hire Earl White, Rusty Stricklan, and Lance Miller because of their union activities and sympathies and to discourage employees from engaging in these activities.

CONCLUSIONS OF LAW

By refusing to consider for hire or to hire Earl White, Rusty Stricklan, and Lance Miller, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees and applicants for employment, thereby discouraging membership in a labor organization, violating Section 8(a)(3) and (1) of the Act. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by refusing to hire or consider for hire Earl White, Rusty Stricklan, and Lance Miller because of their union activity, we shall order the Respondent to expunge from its files any and all references to the unlawful refusal to hire or consider for hire, and to notify them in writing that this has been done.⁴

⁴ As previously stated, we shall hold in abeyance the determination of any further appropriate affirmative remedy.

ORDER

The National Labor Relations Board orders that the Respondent, Just Electric, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for hire or to hire applicants for employment because of their union activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire or consider for hire Earl White, Rusty Stricklan, and Lance Miller, and within 3 days thereafter notify them in writing that this has been done and that the unlawful refusals to hire or consider for hire will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its facilities in Dallas, Texas, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 26, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the issue of how many job openings were available with the Respondent at times relevant to Earl White's, Rusty Stricklan's, and Lance Miller's applications for work is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of The National Labor Relations Board" shall read "Posted Pursuant to a Judgment of The United States Court of Appeals Enforcing an Order of The National Labor Relations Board."

Dated, Washington, D.C. January 28, 2002

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to consider for hire or to hire applicants for employment because of their union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusals to hire or consider for hire Earl White, Rusty Stricklan, and Lance Miller, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful refusals to hire or consider for hire will not be used against them in any way.

JUST ELECTRIC, INC.